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No. 22

In the Supreme Court of the United States

October Term, 1940

LEWIS G. HINES, Secretary of Labor and Industry of the Commonwealth of Pennsylvania, et al., Appellants

v.

BERNARD DAVIDOWITZ

and

VINCENZO TRAVAGLINI

Appeal from the District Court of the United States for the Middle District of Pennsylvania

BRIEF FOR APPELLANTS

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In the Supreme Court of the United States

October Term, 1940

No. 22

LEWIS G. HINES, Secretary of Labor and Industry of the Commonwealth of Pennsylvania, LYNN G. ADAMS, Commissioner of Pennsylvania State Motor Police, WILLIAM J. HAMILTON, JR., Secretary of Revenue of the Commonwealth of Pennsylvania, WARREN R. ROBERTS, Auditor General of the Commonwealth of Pennsylvania, and F. CLAIR ROSS, State Treasurer of the Commonwealth of Pennsylvania,

Appellants.

v.

BERNARD DAVIDOWITZ, a Resident, Citizen and Taxpayer of and to the Commonwealth of Pennsylvania, and VINCENZO TRAVAGLINI, a Resident and Taxpayer of and to the Commonwealth of Pennsylvania, for Themselves and on Behalf of Any and All Other Residents, Citizens and/or Taxpayers as May Wish to Join Them as Party Plaintiffs

Appellees.

Appeal from the District Court of the United States for the Middle District of Pennsylvania

BRIEF FOR APPELLANTS

I

REFERENCE TO OFFICIAL REPORTS OF OPINIONS DELIVERED IN COURTS BELOW.

The opinion of the District Court for the Middle District of Pennsylvania, delivered by Judge Biggs on November 30, 1939, is reported in 30 Fed. Supp., pp. 470, et seq.

II

STATEMENT OF GROUNDS OF JURISDICTION.

Jurisdiction is vested in this court by virtue of the provisions of Section 266 of the Judicial Code, as amended, (28 U. S. C. A. 380) and of Section 24 (14) of the Judicial Code, as amended by 36 Stat. 1092 (28 U. S. C. A. 41 (14)).

In their statement as to jurisdiction heretofore printed and filed with the court, they have set forth in detail the facts pertaining to the jurisdiction of this court on appeal and the authorities sustaining jurisdiction. The appellants respectfully request that said statement as to jurisdiction be incorporated in this brief by reference thereto.

III

STATEMENT OF THE CASE.

This is an appeal from the judgment of the District Court for the Middle District of Pennsylvania. The parties hereto are respectively, the appellant, the Commonwealth of Pennsylvania, and the appellee, Vincenzo Travaglini, in an appeal from the judgment of the District Court for the Middle District of Pennsylvania adjudging the Pennsylvania Act of June 21, 1939, P. L. 652 unconstitutional.

A bill in equity was filed by Bernard Davidowitz and Vincenzo Travaglini to enjoin the enforcement of the Act of June 21, 1939, P. L. 652, 35 P. S. §§1801, et seq., on the ground that this State act is unconstitutional and is in violation of the Constitution of the Commonwealth of Pennsylvania, the Constitution of the United States and treaties.

The Commonwealth of Pennsylvania, by its Attorney General, filed an answer. Appellees, by their counsel, filed a motion for judgment on the pleadings.

Bernard Davidowitz is a resident of the City of Philadelphia, a naturalized citizen of the United States of America, and a taxpayer of and to the Commonwealth of Pennsylvania.

Vincenzo Travaglini is an alien subject of the King of Italy residing in the City of Philadelphia. He was born in Abruzzia, Italy, in 1893, came to the United States of America in 1920 and has resided in Philadelphia since his arrival in the United States. He is not naturalized nor has he filed a declaration to become a citizen of the United States of America.

Argument was had before a three-judge court consisting of two members of the Circuit Court of Appeals and one member of the District Court, as provided in section 266 of the Judicial Code, as amended. Judge Biggs on November 30, 1939 filed his opinion holding that the complaint showed no present cause of action in the plaintiff, Bernard Davidowitz; as to the plaintiff, Vincenzo Travaglini, the court assumed jurisdiction and ruled the Act of June 21, 1939, supra, unconstitutional on two grounds, namely:

I. The act encroaches upon a field reserved to Federal action.

II. The act denies equal protection of the laws to aliens.

An application for allowance of an appeal to the United States Supreme Court was presented to the Honorable Albert L. Watson, United States District Judge. On February 8, 1940, Judge Watson ordered and decreed that the appeal be allowed.

In the jurisdictional statement heretofore presented and filed by appellants, the question of jurisdiction was discussed in detail and the applicable authorities were set forth. We, therefore, do not discuss the question of jurisdiction in this brief.

IV

SPECIFICATION OF ERRORS.

1. The District Court erred in holding and deciding that the Alien Registration Act of the General Assembly of the Commonwealth of Pennsylvania, approved June 21, 1939, P. L. 652, was unconstitutional, by stating:

> "We are of the opinion that the Act is unconstitutional."

2. The District Court erred in holding and deciding that the said Alien Registration Act:

> "* * * does not pertain to a field in which a state may sustain an interest, Truax v. Raich, supra, pp. 39, 40, such as public employment, Heim v. McCall, 239 U. S. 175, ownership in land, Terrace v. Thompson, 263 U. S. 197, conservation of natural resources, Patsone v. Pennsylvania, 232 U. S. 138 and McCready v. Virginia, 94 U. S. 391."

3. The District Court erred in holding and deciding that:

> "The Act therefore is unconstitutional because it purports to operate in a field in which the individual states of the United States are without authority to legislate. Therefore it may not be justified as an exercise of the police power of the State of Pennsylvania. It attempts to usurp power confided by the Constitution to the Federal Government."

4. The District Court erred in holding and deciding that the:

> "* * * purpose of the Legislature may well have been to cause aliens to leave Pennsylvania and enter states where they are not compelled to register or subjected to a registration fee. * * *"

5. The District Court erred in holding and deciding that:

> "* * * The control of aliens and the conditions of their habitation in the states of the United States must remain in the Federal government."

6. The District Court erred in holding and deciding that the act imposed an unreasonable classification and failed to distinguish the Pennsylvania act from the acts in question in the Truax case and Ex Parte Kotta cases.

V

ARGUMENT.

The District Court for the Middle District of Pennsylvania declared the Act of June 21, 1939, P. L. 652, 35 P. S. § 1801, et seq. unconstitutional. This act is commonly known as the Pennsylvania Alien Registration Act, and is set forth at length as a footnote to the opinion of the District Court, from which decision an appeal is taken to this court.

The court below justified its finding that the act was unconstitutional specifically on two grounds:

1. The act encroaches upon a field reserved to Federal action.

2. The act denies equal protection of the laws to aliens.

In discussing the right of the Commonwealth of Pennsylvania to enact the Alien Registration Act and to uphold its constitutionality, our argument will be discussed under these two headings:

1. The act does not encroach upon a field reserved to Federal action.

2. The act does not deny equal protection of the laws to aliens.

The first heading is covered by the first five assignments of error and the second heading by the sixth assignment of error.

1. The Act Does not Encroach Upon a Field Reserved to Federal Action.

As to the first point, it will be observed in reading the District Court's opinion that none of the cases which are cited in support of the court's position justify its conclusion. The cases cited all deal with matters clearly within the field re-

served, under the United States Constitution, to Federal action, that is, to immigration and naturalization. There is clearly a non sequitur for example, between the right of the Federal Government to control immigration, naturalization or interstate and foreign commerce, and the conclusion that the registration of aliens resident within the State, required by the Pennsylvania law, is unconstitutional.

As to the District Court's first position that the act encroaches upon a field exclusively reserved to Federal action, it is evident that the Alien Registration Law does not usurp or conflict with any power granted to the Federal Government.

The Pennsylvania act does not violate Article I, Section 8, Clause 3 of the Constitution of the United States which provides that Congress shall have the power to regulate commerce with foreign nations and among the several states and with the Indian tribes, and to establish a uniform rule of naturalization. The act does not infringe the Federal power to regulate interstate and foreign commerce nor interfere with its power over immigration and naturalization.

Subject to the restrictions contained in this section of the Constitution, each state is supreme, and possesses the exclusive right of regulating its own internal affairs, and in all such matters is supreme so long as it does not conflict with the Federal Constitution. In general, the states may exercise any power possessed by them prior to the adoption of the Constitution unless the exercise of such power is expressly or by necessary implication prohibited thereby or interferes with the exercise of some power delegated to the United States: 36 Cyc. 828. Congress has no general power to enact police regulations operative within the territorial limits of the state. That power has been left with the individual states and cannot be taken from them, either wholly or in part: United States *v.* Cruikshank, 92 U. S. 542, 23 L. Ed. 588 (1876).

The power of the states in this field is unqualified and exclusive, so long as its regulations do not invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive a citizen of rights guaranteed to him thereunder.

Is any power of the Federal Government infringed or interfered with? It is conceded by appellants that the Federal Government has the exclusive power to make treaties with foreign nations, to regulate immigration and naturalization, to declare war and to regulate interstate and foreign commerce.

Does the Pennsylvania statute conflict with any of these powers? It does not infringe on the exclusive power of the Federal Government to regulate immigration and naturalization. The power of the State to restrict, limit and control aliens resident within the limits of the State has been upheld by the highest court of our land, as will be more fully discussed.

What does the Pennsylvania act require? It simply requires that certain aliens, who have not declared their intention to become citizens, register, pay $1.00 for such registration, and carry a registration card.

This requirement of registration does not conflict with powers granted to the Federal Government. The State enacted this law in order to secure information in regard to aliens within its own boundaries. The penalties and the carrying of the card are necessary in order to enforce the law and to prevent evasion.

Compliance by an alien with the State statute does not interfere in any way with his compliance with the naturalization statute. If he files his declaration of intention, he is no longer subject to the State Registration Act, even if he does not complete his application.

It is obvious that there is no inconsistency and no conflict between the alien registering with the State and also with the United States. Legislation under the police power of the State will not be stricken down unless it plainly and palpably conflicts with some authority granted to the Federal Government.

In PLUMLEY *v.* MASSACHUSETTS, 155 U. S. 461, 479, 480 (1894), the court stated:

> "We are not unmindful of the fact—indeed, this court has often had occasion to observe—that the acknowledged power of the states to protect the morals, the health, and safety of their people by appropriate legislation, sometimes touches, in its exercise, the line separating the respective domains of national and state authority. But in view of the complex system of government which exists in this country, 'presenting,' as this court, speaking by Chief Justice Marshall, has said, 'the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union,' the judiciary of the United States should not strike down a legislative enactment of a state—especially if it has direct connection with the social order, the health, and the morals of its people—unless such legislation plainly and palpably violates some right granted or secured by the national Constitution or encroaches upon the authority delegated to the United States for the attainment of objects of national concern."

The Supreme Court has held that a state may pass a law which aids or cooperates with the Federal Government in the exercise of its Federal power.

Thus, in HALTER *v.* NEBRASKA, 205 U. S. 34 (1907), the court sustained a statute of Nebraska which prohibited the use of the national flag for advertising purposes, although the objection was made that the flag was the national emblem, and subject only to the control of the National Government.

Again in GILBERT *v.* MINNESOTA, 254 U. S. 325 (1920), a statute of Minnesota making it a misdemeanor for any person to advocate that citizens of the State refuse to aid or assist the United States in carrying on war, was upheld.

The Supreme Court said:

> "* * * An army is an instrument of government, a necessity of its power and honor, and it may be, of its security. An army, of course, can only be raised and directed by Congress; in neither has the state power, but it has power to regulate the conduct of its citizens, and to restrain the exertion of baleful influences against the promptings of patriotic duty, to the detriment of the welfare of the nation and state. To do so is not to usurp a national power, it it only to render a service to its people, as Nebraska rendered a service to its people when it inhibited the debasement of the flag.
>
> "We concur, therefore, in the final conclusion of the court, that the state is not inhibited from making 'the national purposes its own purposes, to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes.'
>
> "The statute, indeed, may be supported as a simple exertion of the police power to preserve the peace of the state. As counsel for the state say: 'the act under consideration does not relate to the raising of armies for the national defense, nor to rules and regulations for the government of those under arms. It

is simply a local police measure, aimed to suppress a species of seditious speech which the legislature of the state has found objectionable. If the legislature has otherwise power to prohibit utterances of the character of those here complained of, the fact that such suppression has some contributory effect on the Federal function of raising armies is quite beside the question.' * * *"

In the same way, the Pennsylvania Alien Registration Act is a police measure, passed for the purpose of enabling the State to obtain necessary information regarding certain aliens within its borders.

The control of aliens is not within the exclusive power of Congress. Appellants concede that immigration and naturalization under Article I, Section 8, Clause 3, of the United States Constitution are within the exclusive power of Congress, but this provision does not place entire jurisdiction over aliens under Congress, and the states under the police power can place restrictions and limitations upon aliens. State laws restricting aliens have been upheld by the highest courts of our land. Even if control of aliens were within the exclusive power of Congress, and we do not concede that it is, the State still has the right as a local police measure to regulate aliens resident within its borders so long as such regulations are not repugnant to or inconsistent with Federal enactments.

State insolvency laws, liquor laws, state inspection laws and state quarantine laws have been upheld. See the case of INTERNATIONAL SHOE COMPANY *v.* PINKUS, 278 U. S. 261, (1929), 73 L. Ed. 318, where the court held that the Bankruptcy Act only suspends conflicting insolvency laws. See also WALKER *v.* EMERICH, Appellant, 300 Pa. 9 (1930), where the state insolvency acts were upheld. Further, in the case POTTS, Appellant *v.* SMITH MFG. CO., 25 Pa. Super. Ct. 206 (1904), the court in its opinion stated as follows:

> "* * * It is an established doctrine that the powers granted to congress are only exclusive of the powers upon the same subject existing in the states, when an exclusive power is expressly delegated to congress, or there is such incompatibility in the exercise of it by the states as to produce the necessary conclusion, that it is exclusive in congress. Where there is no such exclusive grant to congress or such incompatibility concurrent power remains with the states. Where, however, in the case of concurrent powers congress has exercised its power on a given subject, the control of the state over that subject is by such action of congress prohibited. * * *"

It should be noted that Pennsylvania passed its law to register aliens on June 21, 1939, but it was not until June 28, 1940, that Congress passed its act entitled "Alien Registration Act of 1940". The Pennsylvania act does not in any way restrict aliens coming into the State or expel them from the State. Until there was an existent Federal Act requiring aliens to register, there was no conflict with the general power delegated to the Federal Government covering the subject of naturalization and immigration. See also NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY *v.* PEOPLE OF STATE OF NEW YORK, 165 U. S. 628, (1897) where the court stated:

> "According to numerous decisions of this court (some of which are cited in the margin) sustaining the validity of state regulations enacted under the police powers of the state and which incidentially affected commerce among the states and with foreign nations, it was clearly competent for the state of New York, in the absence of national legislation covering the subject, to forbid under penalties the heating of passenger cars in that state by stoves or furnaces kept inside the cars or suspended therefrom, although such cars may be employed in

interstate commerce. While the laws of the states must yield to acts of Congress passed in execution of the powers conferred upon it by the Constitution (Gibbons v. Ogden, 22 U. S. 9 Wheat 1, 211 [6:23, 73], the mere grant to Congress of the power to regulate commerce with foreign nations and among the states did not, of itself and without legislation by Congress, impair the authority of the states to establish such reasonable regulations as were appropriate for the protection of the health, the lives, and the safety of their people. * * *"

If and when Congress acts, the State act is not unconstitutional but is merely in abeyance, except in such cases where Congress and the State have concurrent jurisdiction. There is no question about the right of the State to act in the absence of Federal legislation. The Alien Registration Act was constitutional when passed, since it does not impinge on any power granted to Congress for it does not relate to the entrance of aliens into the State nor to their deportation, nor does it interfere in any way with naturalization or with foreign or interstate relations. It represents simply a local police measure aimed to obtain information regarding aliens resident within the State's borders for the protection of the citizens, law-abiding aliens and property. The only question is whether the State act is in abeyance or whether the State and Federal Government have concurrent jurisdiction to register aliens for the protection of inhabitants and property. Neither the State nor the Federal acts are oppressive measures, but both are designed merely to obtain information and permanent records of certain aliens resident within their respective borders. The law-abiding alien has nothing to fear, but the public as a whole has a right to demand protection from the enemy alien. The only way for the State to afford such protection is by way of obtaining the necessary information relative to aliens resident within its borders. Thus, the Pennsylvania Alien

Registration Act should be upheld since control or restriction of aliens is not within the exclusive power of Congress and the State under its police power has the right to register aliens in order to protect its citizens, law-abiding aliens and property.

2. The Act Does Not Deny Equal Protection of the Laws to Aliens.

As to the second point, the District Court held that "The act denies equal protection of the laws to aliens". As to this, we say generally that our contention is that the Pennsylvania Alien Registration Act is clearly within the police power reserved to the several states and, therefore, does not violate the denial of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

As to this question of police power and denial of due process, may we say parenthetically that the District Court's opinion criticised the Pennsylvania act because it does not state any purpose. It must be borne in mind that the purpose of the statute must be obtained from its provisions rather than from any expressed declaration of purpose in the act itself, although the practice has presently been to state in a great deal of legislation, both Federal and state, the purpose for the passage of the act. The provisions of such statutes may be declared unconstitutional in spite of the efforts of the draftsmen to support the statute by declaring the purposes which fall clearly within the Constitution.

From the act itself, it is apparent that the purpose is to secure information and statistics, as a census will do, in addition to registering aliens, which will aid the Commonwealth of Pennsylvania in not only obtaining necessary data regarding residents within its borders but will assist in the formulation and administration of laws governing these subjects.

Pennsylvania, by this enactment, required all aliens, with certain exceptions, to be registered.

The state not only has the authority but it also has the obligation to enact police laws, especially to protect lives and property within its limits. In protecting life and property, it is very important that the state should know who has declared an intention to become a citizen of the United States and who has not done so. The alien who does not declare his intention to become a citizen might possibly be a blackhander, a spy or a member of a Fifth Column. He may be concealing his identity, his whereabouts and activities. Though the alien's declaration of intention to become a citizen is not a guaranty of loyalty, in most cases it is prompted by a desire to become an American and to assume the obligations of citizenship.

Pennsylvania is a great industrial state and has a large foreign population, much of which is employed in its industries. The State has the duty of guarding its great industries, its steel and ammunition plants and other factories whose products are essential in war. Two of the three armor plate plants in the United States are located in Pennsylvania.

The Federal Government has no general police power. Except in the case of war or other emergency, it makes no effort to protect lives and property generally within the state.

It is significant that the Pennsylvania Alien Registration Law was enacted on June 21, 1939, and that the Act of Congress entitled the "Alien Registration Act of 1940" was enacted June 28, 1940. The Pennsylvania act is not as drastic as the Federal act, and does not include fingerprinting. It may be noted that on August 5, 1940, President Roosevelt, in a message to the Governors of the States meeting with the officials of the United States Department

of Justice in Washington, suggested that Congress and the state legislatures should enact companion laws to deal with all forms of Fifth Column activities. As the Federal Government has not yet taken any measures under the war power to protect essential industries in Pennsylvania or any of the states, this duty devolves entirely upon the state. It is essential that the states retain the power and right to determine its own public policy, and what measures are necessary for its protection and the safety, peace and good order of its people.

In TERRACE *v.* THOMPSON, 263 U. S. 197 (1923), the State of Washington had enacted a law which provided that:

> "The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, * * *."

This statute was attacked as denying the Due Process of Law and the Equal Protection of the Laws, but it was sustained.

In the opinion of the Supreme Court, Mr. Justice Butler said:

> "* * * The 14th Amendment, as against the arbitrary and capricious or unjustly discriminatory action of the state, protects the owners in their right to lease and dispose of their land for lawful purposes, and the alien resident in his right to earn a living by following ordinary occupations of the community, but it **does not take away from the state those powers of police that were reserved at the time of the adoption of the Constitution.** Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Mugler v. Kansas, 123 U. S. 623, 663, 31 L. ed. 205, 211, 8 Sup. Ct. Rep.

273; Powell v. Pennsylvania, 127 U. S. 678, 683, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; Re Kemmler, 136 U. S. 436, 449, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930; Lawton v. Steel, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Phillips v. Mobile, 208 U. S. 472, 479, 52 L. ed. 578, 581, 28 Sup. Ct. Rep. 370; Hendrick v. Maryland, 235 U. S. 610, 622, 623, 59 L. ed. 385, 390, 391, 35 Sup. Ct. Rep. 140. **And in the exercise of such powers the state has wide discretion in determining its own public policy and what measures are necessary for its own protection and properly to promote the safety, peace, and good order of its people.''** (Boldface ours)

It is true that after an alien is admitted into the United States, he has the right to enter and to reside in any state. This right is included in the equal protection of the laws guaranteed by the fourteenth amendment.

The Pennsylvania statute, however, does not deny such rights. The alien is free to enter Pennsylvania, move freely about or reside in this state or depart therefrom. He is allowed to own property, secure employment, engage in business, have access to the courts, and is entitled to equality in taxation with residents. The state makes no requirement except that if he resides here, he must register and pay a fee of $1.00 per year and carry a card showing his registration. Except for this his movements and activities are not subject to any different supervision from those of a citizen. He is free to enter and travel about and depart without paying the dollar. The dollar is collected only in case he resides here.

He is not charged for the privilege of residing in this state. It is only residents who are required to register, and the dollar helps to defray the cost of registration.

If the law is a proper exercise of the police power, the requirement of the fee will not infringe any Federal right. This fee is no more than is required to pay the cost of administering the law.

The contention of the court that the purpose of the act is to induce aliens to seek naturalization, is immaterial. Many Americans believe that an alien who comes to this country and earns his living here and derives the benefit of our Government, should also assume its obligations by becoming a citizen.

But the Pennsylvania statute does not require the alien to become naturalized. As soon as the alien has filed his first papers, i. e., declares his intention to become a citizen, the act no longer applies to him. He passes beyond the scope of the statute, whether or not he becomes naturalized later. Surely the necessity of paying $1.00 a year and carrying a registration card would furnish no substantial inducement to an alien to change his citizenship or his residence.

An infinitely greater inducement to become a citizen was furnished by the Oregon statute sustained by the Supreme Court, which prohibited an alien from owning land. Other states have passed laws conferring the right to vote upon an alien who has taken out his first papers. These statutes may be said to furnish an incentive to an alien to become naturalized.

The classification of aliens who have declared an intention to become citizens, has been upheld by the Supreme Court of the United States. This same distinction was made in a Washington law and upheld in TERRACE *v.* THOMPSON (1923), supra.

> "The rights, privileges, and duties of aliens differ widely from those of citizens; and those of alien

declarants differ substantially from those of nondeclarants. Formerly in many of the states the right to vote and hold office was extended to declarants, and many important offices have been held by them. But these rights have not been granted to nondeclarants. By various acts of Congress, declarants have been made liable to military duty, but no act has imposed that duty on nondeclarants * * * The aliens formally declared bona fide intention to renounce forever all allegiance and fidelity to the sovereignty to which he lately has been a subject, and to become a citizen of the United States and permanently to reside therein, markedly distinguishes him from an ineligible alien, or an eligible alien who has not so declared.

"* * * Eligible aliens who have not declared their intention to become citizens are included, and the act provides that unless declarants be admitted to citizenship within seven years after the declaration is made, bad faith will be presumed. This leaves the class permitted so to own land made up of citizens and aliens who may, and who intend to, become citizens, and who in good faith have made the declaration required by the naturalization laws. The inclusion of good-faith declarants in the same class with citizens does not unjustly discriminate against aliens who are ineligible, or against eligible aliens who have failed to declare their intention. The classification is based on eligibility and purpose to naturalize. * * * And we think it is clearly within the power of the state to include nondeclarant eligible aliens and ineligible aliens in the same prohibited class. Reasons supporting discrimination against aliens who may, but will not, naturalize, are obvious."

This opinion of the Supreme Court states the grounds for placing aliens who have not declared their intention to become citizens in a separate class and answers the contention that the classification is unreasonable.

An alien who has declared his intention to become a citizen, makes a public record showing the length of time that he has been in the United States, where he resided in the old country and where he resides in this country, together with other facts. His declaration of intention states that he will renounce any allegiance to any foreign country and will swear allegiance to the United States. It shows his faith in and adherence to the principles of this Government.

In contrast, the criminal alien ordinarily will not file a declaration of intention and disclose his place of residence and his antecedents in the foreign country.

In addition, an alien who has not declared his intention to become a citizen, is not subject to military service under the laws of the United States.

Under the Pennsylvania statute the criterion is not foreign birth, but the intention to become a citizen of the United States.

An immigrant who has taken out his first papers, stands on an equality with a native-born American.

In COCKRILL *v.* CALIFORNIA, 268 U. S. 258, 262, (1925) the Supreme Court said:

> "* * * The equal protection clause does not require absolute uniformity, or prohibit every distinction in the laws of the state between ineligible aliens and other persons within its jurisdiction. The state has a wide discretion and may classify persons on bases that are reasonable and germane, having regard to the purpose of the legislation. Truax v. Corrigan, 257 U. S. 312, 337, 66 L. ed. 254, 265, 28 A. L. R. 375,

42 Sup. Ct. Rep. 124. This is well illustrated by the Alien Land Laws. Terrace v. Thompson, supra, 218; Porterfield v. Webb, supra, 233; Webb v. O'Brien, supra, 324; Frick v. Webb, supra, 333. * * *"

While an alien is not absolutely entitled to the privileges and immunities of a citizen, strictly as such, under the fourteenth amendment, yet he is a "person" to whom the state cannot deny the equal protection of the laws. This clause is universal in its application to all persons within the territorial jurisdiction, without regard to any differences of race, color, or nationality, as instanced in many cases, some of which we present as follows:

BARBIER *v.* CONNOLLY, 113 U. S. 27, 28 L. Ed. 923 (1885)
TERRACE *v.* THOMPSON, 263 U. S. 197, 62 L. Ed. 255 (1923)
FRICK *v.* WEBB, 263 U. S. 326, 68 L. Ed. 323 (1923)
WEBB *v.* O'BRIEN, 263 U. S. 313, 68 L. Ed. 318 (1923)
HEIM *v.* MCCALL, 239 U. S. 176, 60 L. Ed. 206 (1915)
TRUAX *v.* RAICH, 239 U. S. 33, 60 L. Ed. 131 (1915)
PATSONE *v.* PENNSYLVANIA, 232 U. S. 138, 58 L. Ed. 539 (1914).
OHIO EX REL. *v.* DECKEBACH, 274 U. S. 392, 71 L. Ed. 1115. Anno. 24 A. L. R. 1120 (1927)
STATE *v.* RHEAUME, 80 N. H. 319, 116 A. 758. See also 2 Am. Juris., Sec. 10.

We briefly refer to these cases in order to show that the fourteenth amendment, in its application to the problem involved, has not been so interpreted by the courts as to warrant the contentions of the plaintiffs.

BARBIER *v.* CONNOLLY, supra, Mr. Justice Field held that the fourteenth amendment is not designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people.

On page 31 he said:

> "The 14th Amendment, in declaring that no State 'Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoilation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. * * *"

TERRACE *v.* THOMPSON, supra, held that the fourteenth amendment to the Federal Constitution does not take from the states those police powers that were reserved at the time of the adoption of the Constitution.

Each state has, in the absence of a treaty provision to the contrary, the power to deny aliens the right to own land within its borders. Mr. Justice Butler said, on page 218:

> "State legislation applying alike and equally to all aliens, withholding from them the right to own land, cannot be said to be capricious, or to amount to an arbitrary deprivation of liberty or property, or to transgress the due process clause.
>
> "This brings us to a consideration of appellants' contention that the act contravenes the equal protection clause. That clause secures equal protection to all in the enjoyment of their rights under like circumstances. Re Kemmler, 136 U. S. 436, 449, 54 L. ed. 519, 524, 10 Sup. Ct. Rep. 930; Giozza v. Tiernan, 148 U. S. 657, 662, 37 L. ed. 599, 601, 13 Sup. Ct. Rep. 721. But this does not forbid every distinction in the law of a state between citizens and aliens resident therein. In Truax v. Corrigan (257 U. S. 312, 66 L. ed. 254, 27 A. L. R. 375, 42 Sup. Ct. Rep. 124), this court said (p. 337):
>
> "'In adjusting legislation to the need of the people of a state, the legislature has a wide discretion, and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable,—**that classification of persons is constantly necessary.** * * * Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between things and persons, and class them in accordance with their pertinence to the purpose in hand.'

> "The rights, privileges, and duties of aliens differ widely from those of citizens; and those of alien declarants differ substantially from those of nondeclarants. Formerly in many of the states the right to vote and hold office was extended to declarants, and many important offices have been held by them. But these rights have not been granted to nondeclarants. * * *" (Boldface supplied)

FRICK *v.* WEBB, supra, declared constitutional the California act denying to ineligible aliens the right to acquire stock in a corporation holding land for agricultural purposes; Mr. Justice Butler in his opinion held that this act did not deny the equal protection of the laws in violation of the fourteenth amendment.

WEBB *v.* O'BRIEN, supra, held that a California act which limited the privilege of ineligible aliens to acquire real property within the state to that prescribed by a treaty, was not in conflict with the fourteenth amendment.

HEIM *v.* MCCALL, supra, decided that the employment of citizens only on public works in New York was not a violation of this amendment.

TRUAX *v.* RAICH, supra, declared an Arizona statute which provided that every employer of more than five workers at any one time, regardless of the kind or class of work or the sex of workers, shall employ not less than eighty percent qualified electors or native-born citizens of the United States, was invalid as a denial of constitutional provision as to equal protection of the laws. Neither could it be justified, as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. The Court said:

"* * * It must also be said that reasonable classification implies action consistent with the legitimate interests of the state, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. * * *"

The Pennsylvania statute involves a reasonable classification in that it proposes merely to obtain information regarding certain aliens resident within its borders by means of registration and does not at all impinge on Federal jurisdiction over immigration and naturalization or inhibit the alien in the range of employment.

PATSONE *v.* PENNSYLVANIA, supra, was a case which involved a Pennsylvania statute, making it unlawful for aliens to kill wild birds or animals except in defense of person or property; made it unlawful to possess shotguns or rifles. The plaintiff in that case was found guilty, under this Act of Assembly, and he successively appealed to the Superior Court and the Supreme Court of Pennsylvania, and finally the case came before the Supreme Court of the United States, on the ground that the statute contravened the fourteenth amendment to the Federal Constitution. Mr. Justice Holmes, in affirming the decision of the State courts, said:

"Under the 14th Amendment the objection is twofold; unjustifiably depriving the alien of property, and discrimination against such aliens as a class. But the former really depends upon the latter, since it hardly can be disputed that if the lawful object, the protection of wild life (Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600), warrants the discrimination, the means adopted for making it effective also might be adopted. The possession of rifles and shotguns is not necessary for other purposes not within the statute. It is so peculiarly appropriated to the forbidden use that if

such a use may be denied to this class, the possession of the instruments desired chiefly for that end also may be. The prohibition does not extend to weapons such as pistols that may be supposed to be needed occasionally for self-defense. * * *

"The discrimination undoubtedly presents a more difficult question. But we start with the general consideration **that a state may classify with reference to the evil to be prevented**, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. Lindsley v. National Carbonic Gas Co. 220 U. S. 61, 80, 81, 55 L. ed. 369, 378, 379, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912 C, 160. The state 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.' Central Lumber Co. v. South Dakota, 226 U. S. 157, 160, 57 L. ed. 164, 169, 33 Sup. Ct. Rep. 66; Rosenthal v. New York, 226 U. S. 260, 270, 57 L. ed. 212, 216, 33 Sup. Ct. Rep. 27; L'Note v. New Orleans, 177 U. S. 587, 44 L. ed. 899, 20 Sup. Ct. Rep. 788. See further Louisville & N. R. Co. v. Melton, 218 U. S. 36, 54 L. ed. 921, 47 L. R. A. (N. S.) 84, 30 Sup. Ct. Rep. 676. The question therefore narrows itself to whether this court can say that the Legislature of Pennsylvania was not

warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent. Barrett v. Indiana, 229 U. S. 26, 29, 57 L. ed. 1050, 1052, 33 Sup. Ct. Rep. 692.

"Obviously the question, so stated, is one of local experience, on which this court ought to be very slow to declare that the state legislature was wrong in its facts. Adams v. Milwaukee, 228 U. S. 572, 583, 57 L. ed. 971, 977, 33 Sup. Ct. Rep. 610. * * *" (Boldface ours)

OHIO EX REL *v.* DECKEBACH, supra, was a case involving an ordinance forbidding the issuance of licenses for pool-rooms to aliens. Mr. Justice Stone said, on page 396:

"The objections to the constitutionality of the ordinance are not persuasive. Although the 14th Amendment has been held **to prohibit plainly irrational discrimination against aliens. * * * it does not follow that alien race and allegiance may not bear in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification.** Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; Crane v. New York, 239 U. S. 195, 198, 60 L. ed. 218, 226, 36 Sup. Ct. Rep. 85; Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 Sup. Ct. Rep. 15; Porterfield v. Webb, 263 U. S. 225, 68 L. ed. 278, 44 Sup. Ct. Rep. 21; Webb v. O'Brien, 263 U. S. 313, 68 L. ed. 318, 44 Sup. Ct. Rep. 112; Frick v. Webb, 263 U. S. 326, 68 L. ed. 323, 44 Sup. Ct. Rep. 115; Cockrill v. California, 268 U. S. 258, 69 L. ed. 944, 45 Sup. Ct. Rep. 490; cf. McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248.

* * * * *

"It is enough for present purposes that the ordinance, in the light of facts admitted or generally assumed, does not preclude the possibility of a rational basis for the legislative judgment and that we have no such knowledge of local conditions as would enable us to say that it is clearly wrong. Ft. Smith Light & Traction Co. v. Board of Improvement. * * *

"Some latitude must be allowed for the legislative appraisement of local conditions * * *" (Boldface ours)

With respect to aliens, the Supreme Court of New Hampshire set out the relationship of an alien to the asylum Government in STATE *v.* RHEAUME, 80 N. H. 319, Vol. 116, Atl. 758, a case which involved the possession of firearms by aliens without a permit. A discrimination made in the statute between the citizens and the non-citizens was upheld, the court stating:

"* * * The evident intent of the legislature was to promote the public welfare by establishing a system by which a record should be kept, open to the inspection of the public authorities, of the location of dangerous explosives and firearms, and to limit their possession in irresponsible hands. It was an incident to such a system that a classification should be made, based on domicile, allegiance, duty, habit, temperament, and other characteristics which distinguish the citizen and applicant for citizenship from the alien who has manifested no desire or intention to bind himself to support the government.

"Citizens as a class have more settled domiciles, and are better known to the local police officials, while the sojourn of aliens in this country, in theory, and usually in practice, is temporary, and their

abode, while here, capricious and uncertain. Citizens by means of taxation bear the expense of the government and of police protection, while the alien does not necessarily pay taxes or share any part of the public burden. Native citizens are justly presumed to be imbued with a natural allegiance to their government which unnaturalized aliens do not possess. The former inherit a knowledge and reverence for our institutions while the latter as a class do not understand our customs or laws, or enter into the spirit of our social organization. Or, passing more directly to the use of firearms, the citizen has an obligation to defend the state, while the alien has none. The citizen is required to assist in maintenance of order, the enforcement of law, and the arrest of wrongdoers in some instances. It is clear that there exists a reasonable and substantial basis for the classification. It seems reasonable to class with native citizens persons who have been naturalized or who have legally declared their intention to become citizens, since, under the naturalization laws, they have declared or indicated their purpose to declare their allegiance to our Constitution, have submitted evidence of their attachment to our institutions, have adopted a place of residence, and have assumed or contemplated the full assumption of the duties of citizenship. * * *"

It may be stated as a general rule that all aliens residing in the United States for a shorter or longer time are entitled, so long as they are permitted by the Government to remain in the country, to the safeguards of the Constitution, to the protection of the laws, in regard to their rights of person and property, and to their civil and criminal responsibility. These provisions of the Constitution which

are applicable to, and may be invoked by aliens, can be determined only from the terms of the instrument itself.

Certain provisions of the Constitution are couched in such unqualified and absolutely prohibitory terms that it is not open to serious doubt that aliens may, in proper cases, successfully invoke their protection. Of such character are the prohibition of Congress against a suspension of the privilege of habeas corpus except in time of public danger; the prohibition against the passage of bills of attainder or ex post facto laws; the provision that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, or be twice put in jeopardy, or be compelled in any criminal case to be a witness against himself; the provision securing the right to defendants to have compulsory process for obtaining witnesses in their favor; and the guaranty against excessive bail and fines, and cruel and unusual punishment. According to the weight of authority, an alien is also entitled to freedom from unreasonable searches and seizures.

Certain rights are denied to aliens as several constitutional guaranties are, by the terms of the instrument insured only to citizens. Under these clauses an alien may not successfully invoke equal privileges and immunities. Of this class are the provisions that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and that "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States."

Aliens obviously are not within the protection of a constitutional provision that the people have at all times the right to alter their form of government in such manner as they may think expedient. Nor does the constitutional right of freedom of speech include the right of aliens to pub-

lish disloyal, scurrilous, or abusive matter concerning the form of government, or matter which fosters opposition to organized government.

Guaranty of due process is given to alien inhabitants of a state who are entitled to the guaranty of the fourteenth amendment that no state shall "deprive any person of life, liberty, or property without due process of law." It is likewise well-settled that an alien may demand that he be accorded due process by the Federal Government.

Equal protection of the laws is also afforded alien inhabitants of a state under the guaranty of the fourteenth amendment that no state shall "deny to any person within its jurisdiction the equal protection of the laws." It must be observed, however, that this constitutional guaranty of the equal protection of the law applies only to aliens within the jurisdiction of the United States.

In general aliens are under no special constitutional protection which forbids a classification otherwise justified simply because the limitation of the class falls along the lines of nationality. That would be requiring a higher degree of protection for aliens as a class than for similar classes of American citizens. Broadly speaking, the difference in status between citizens and aliens constitutes a basis for reasonable classification in the exercise of police power.

The question whether a mere privilege or a right is involved is sometimes apparently made the criterion of the power to discriminate against aliens, such power to discriminate being affirmed in the former case, but denied in the latter. This criterion serves where, as in case of a license to practice law, it is clear that a privilege, and not a natural right, is involved, but it is frequently unsatisfactory if not misleading, as practical test, since there is a tendency to

characterize what is inherently and in its origin, at least a right, as a mere privilege because of the necessity or desirability, evinced by the statute or ordinance itself, to restrict, or impose conditions upon its exercise.

The question fairly arises, how have these plaintiffs been denied the equal protection of the law? To ask the question answers it. It would be a startling proposition that there could not be a classification for governmental purposes, if all of the group are included in such classification, excluding others not similarly situated, for as said by Mr. Justice Stone in OHIO EX REL. *v.* DECKEBACH, supra, "It does not follow that alien race and allegiance may not bear in some instances such relation to a legitimate object of legislation as to be made a permitted classification."

It is too broad an interpretation of the rights of aliens to say that they have the same rights as citizens under the fourteenth amendment to the Federal Constitution. The law is definitely settled that aliens can be classified as a group for purposes of legislation, and numerous restrictions on aliens have thus been upheld.

Licenses may be restricted to citizens. However, a statute which arbitrarily prohibits aliens from engaging in ordinary kinds of business is unconstitutional: STATE *v.* MONTGOMERY, 94 Mo. 192; 47 Atl. 165.

But discrimination against aliens in the granting of licenses to maintain a business which, though lawful, is subject to abuse and likely to become injurious to the community (ANTON *v.* VAN WINKLE, 297 Fed. 340 (1924)) is based upon a lawful legislative classification, since it is not unreasonable to suppose that the foreign-born, whose allegiance is first to their own countries, and whose ideals of governmental environment and control have been engendered and formed under entirely different regimes and political systems, have not the same inspiration for the public weal, and are not as

well disposed toward the United States as those who, by citizenship, are a part of the government itself: STATE EX REL. *v.* CARREL, 99 Ohio 285; 124 N. E. 129 (1919).

Thus, there is no question but that a state's denial to persons not citizens of the United States, of the right to obtain licenses to sell intoxicating liquors, is not an unlawful discrimination against aliens or an abridgement of their rights within the prohibition of the fourteenth amendment of the Federal Constitution: TRIMBLE'S LICENSE, 41 Pa. Super. Ct. 370 (1909).

As to soft drinks, there is some difference of opinion. However, MILLER *v.* NIAGARA FALLS, 207 App. Div. 798, 202 N. Y. Supp. 549, held that a city ordinance forbidding such licenses to aliens was constitutional.

In GEORGE *v.* PORTLAND, 235 Pac. 681 (Oregon case), a regulation of aliens by way of licensing pawnbrokers was declared constitutional. In ASAKURA *v.* SEATTLE, 122 Wash. 81; 210 Pac. 20, reversed in 265 U. S. 332; 68 L. Ed. 1041 (1924), the court did not uphold an ordinance denying licenses for transaction of pawnbroker's license to other than a citizen because such ordinance violated a treaty with Japan.

Discrimination against aliens in the regulation of natural resources is universally upheld, inasmuch as the state, in its sovereign capacity, holds such resources in trust for its people, and may, therefore, through its legislative power, lawfully limit and restrict the right of enjoyment to its own citizens. Thus, an ordinance in a city denying the right to aliens to use the highways as a common carrier was held valid in GIZZARELLI *v.* PRESBREY, 44 R. I. 333; 117 Atl. 359. Note also that the right to a pilot's license denied by statute to aliens was held constitutional: STATE *v.* AMES, 47 Wash. 328; 92 Pac. 137.

The right to bear arms has, in certain cases, been restricted to citizens. It is generally held that where the legislature is

dealing with subject-matters of great inherent danger to the public, a classification may be made, based on domicile, allegiance, duty, habit, temperament, and other characteristics which distinguish the citizen and applicant for citizenship from the alien who has manifested no desire or intention to bind himself to support the Government. Upon this theory, it has been held that a statute forbidding resident aliens to own or possess firearms of a character which may be readily concealed on the person, is within the police power of the state. For the same reason, a statute prohibiting the killing of any wild bird or animal by unnaturalized, foreign-born residents, except in protection of person or property, and forbidding their possession of firearms for the purpose named, has been held not to be a denial of the equal protection of the laws: PATSONE *v.* PENNSYLVANIA, 232 U. S. 138; 58 L. Ed. 539 (1914) and EX PARTE RAMERIZ, 193 Cal. 633; 226 Pac. 914.

Right of guardianship has been limited to citizens. The equal protection of the laws is not unconstitutionally denied to an alien parent seeking appointment as guardian of his American-born child, by a statute denying the right of guardianship to an alien, where the estate consists, in part, of real property: RE FUJIMOTS, 130 Wash. 188; 226 Pac. 505.

The right of administration also has been limited to citizens. Under the common law, a non-resident, even an alien, might be named and appointed executor. Nevertheless, a statute denying to an alien the right to act as administrator is a valid exercise of the legislative power: RE MULFORD, 217 Ill. 242; 75 N. E. 345 (1905).

As discussed, supra, **the constitutionality of limiting employment on public works to citizens has been upheld.** However, if work sought to be controlled by the Government is private, and the public welfare is in no way involved, it is clear that the legislature cannot deny to the individual employer the right to employ aliens. In such case it is held that

to deprive aliens, merely because of their alienage, of the opportunity of earning a livelihood, would be equivalent to the assertion of the right to deny them entrance and abode in the state: JUNIATA LIMESTONE CO. *v.* FAGLEY, 187 Pa. 193 (1898). On the other hand, if the work, though private, is such that the exclusion of aliens is, in fact, necessary to the protection of the public welfare, such exclusion is within the police power. Where the work is public and, therefore, wholly subject to the police power, the exclusion of aliens need not be shown to sustain any relation to the public welfare in order to be valid (TRUAX *v.* RAICH, supra; PEOPLE *v.* CRANE, 214 N. Y. 154, affirmed 239 U. S. 195; 60 L. Ed. 226 (1915)), and a statute prohibiting the employment of aliens on public work by a state, municipality, or contractor does not unconstitutionally discriminate against aliens. It should be observed, however, that the state, though authorized to exclude aliens from employment on public works in favor of citizens, may not exclude aliens from the enjoyment of those works after completion: PEOPLE *v.* CRANE, supra.

Restrictions on aliens have been successfully imposed to curtail certain miscellaneous rights. For example, the right to vote, though generally limited to citizens, in some instances has been granted to aliens under certain conditions. It is an unquestionable principle of sound national policy that as the supreme power rests wholly in the citizens of the country, so the exercise of it, or of any branch of it, ought to be delegated to none but citizens, and only to citizens. In view of this principle, it is provided by statute or constitution in most states that none but citizens shall be allowed to vote. In some states, however, it seems that the elective franchise is granted by the Constitution to all male inhabitants with certain qualifications as to residence, age, etc., and in construing these statutes, some courts have held that aliens possessing the other qualification might vote, while other courts have treated the word "inhabitants" as synonymous with citi-

zens: COOK *v.* STATE; 90 Tenn. 407; 16 S. W. 471; 2 AM. JURIS., p. 472, Sec. 18.

The right to hold public office is generally limited to citizens. At the very foundation of all independent popular governments lie the principles, the enforcement of which needs the aid of neither statutory nor constitutional enactments or restrictions, that the government is instituted by the citizens, and that it is to be administered, and its powers and functions exercised, only by them and through their agency. Viewed in the light of these principles, it is obvious that an alien is ineligible to hold public office unless specially authorized by statute. So, if a person who is not an elector because he is an alien attempts to exercise the functions of a public office, the courts, on proper proceedings being instituted for the purpose, will oust him. While there seems to be no doubt regarding the ineligibility of an alien to hold public office, there is a conflict among the cases as to the right of an alien to be elected to a public office and to hold the same after he has become qualified by becoming naturalized or declaring his intention to become a citizen. One line of authorities holds that the qualification of a candidate for public office should be consummate at the time of his election, and that it will not do that it becomes so before the time for him to qualify and enter upon the duties of his office. Other authorities maintain that the question of eligibility pertains to holding office and not to being elected to office, and, therefore, that if an alien is elected to office and becomes naturalized before the time to enter upon the duties of his office, he is qualified to hold office: 2 AMERICAN JURISPRUDENCE, page 473, Sec. 20.

The right to serve as a juror is the special prerogative of citizens. Aliens are disqualified for jury duty, but a party to an action, to avail himself of this objection must ordinarily take it by challenge, and not at a later stage of the proceedings. Though there is some variance of opinion on this point, it is generally held that alienage of a juror is no objection

when made after verdict. By others, however, it is maintained that the fact that an alien sat on the jury in a trial for felony vitiates the judgment, and that the objection that one of the grand jurors was not a citizen may be taken by special plea: 2 AMERICAN JURISPRUDENCE 473, Sec. 21.

The right to practice law is a privilege and its limitation to citizens is valid. The qualifications required for admission to the Bar are exclusively within the policy and discretion of each state. One of the conditions required in most states is that the applicant must be a citizen of the United States. The power of the state to prescribe citizenship as a requirement for admission to the Bar, and thus close the door to this profession to aliens, has never been denied. The applicant, upon his admission to the Bar, becomes an officer of the court. This is a privilege and not a right, and the power which grants the privilege can deny it to aliens. That the applicant has been admitted to practice in all the courts of another state is immaterial: 2 AMERICAN JURISPRUDENCE 474, Sec. 22.

Aliens can be debarred from the **right to form a corporation.** A state has a right to debar aliens from holding shares in her corporation, or to admit them to that privilege only on such terms as may be prescribed. The right of association under the protection of an artificial personality, and of doing business on its credit, whether it is obtained by a special charter or under a general incorporation law, is a franchise granted by the state to such, and such only, as are deemed fit to be intrusted with its exercise. Aliens can be excluded from membership in such bodies, unless they enter them on conditions which subject their investments to such burdens of taxation as the legislature may consider it proper to impose. This general rule may, of course, be modified by treaty: COMMONWEALTH *v.* HEMMINGWAY, 131 Pa. 614, 636; (1890) 2 AMERICAN JURISPRUDENCE 474, Sec. 23; 7 RULING CASE LAW, page 296, Sec. 272.

Thus, under the Pennsylvania Corporation Act of 1874, and as amended, the charter must be subscribed by five or more persons, three of whom, at least, must be citizens of this Commonwealth, and in the Act of May 5, 1933, P. L. 289, Article II, Section 201, for a nonprofit corporation, three of the five incorporators must be citizens of the United States, and under the Act of May 5, 1933, P. L. 364, Article II, Section 201, for a business corporation, at least two-thirds of the incorporators must be citizens.

Rights in realty have been limited to citizens. At common law aliens have no capacity to hold land against the state, and, if taken, the land may be escheated to the state: WEBB *v.* O'BRIEN, 263 U. S. 313, 68 L. Ed. 318; (1923) 2 AMERICAN JURISPRUDENCE 476, Sec. 28.

An alien cannot in general acquire title to real estate by descent, or by other mere operation of law: JACKSON *v.* LUNN, 3 Johns. Cas. (N. Y.); HUNT *v.* WARNICKE'S HEIRS, Hard. (Ky.) 61; GEOFROY *v.* RIGGS, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642 (1890).

If he purchases land, he may be divested of the fee, upon an inquest of office found; but until this is done, he may sell, convey, or devise the lands and pass a good title to the same; ORR *v.* HODGSON, 4 Wheat. (U. S.) 453, 4 L. Ed. 613; (1819) FOX *v.* SOUTHACK, 12 Mass. 143; MOOERS *v.* WHITE, 6 Johns. Ch. (N. Y.) 365; MONTGOMERY *v.* DORION, 7 N. H. 475; OREGON MTG. CO. *v.* CARSTENS, 16 Wash. 165, 47 Pac. 421.

The state alone can question his right to hold land. BELDEN *v.* WILKINSON, 68 N. Y. Supp. 205; MADDEN *v.* STATE, 68 Kan. 658, 75 Pac. 1023.

As to rights acquired by operation of law, such as inheritance, at common law there could be no inheritance through an alien. The right of a state, in the absence of a treaty, to declare an alien capable of inheritance or taking property

and holding the same within its borders, is not precluded by the Constitution of the United States: BLYTHE *v.* HINCKLEY, 180 U. S. 333, 21 Sup. Ct. 390, 45 L. Ed. 557 (1901).

Thus, numerous restrictions have been upheld, for example, the restriction on aliens to use certain dangerous mechanisms or do certain things which fall within the class requiring licenses. See WRIGHT *v.* HAY, 127 Minn. 150, 149 N. W. 9; ANTON *v.* VAN WINKLE, 297 Fed. 340 (1924); STATE *v.* CARREL, 99 Ohio 285, 124 N. E. 129 (1919). Also, an ordinance prohibiting the issuance of a license to operate a motor bus to one who was not a citizen was sustained in GIZZARELLI *v.* PRESBREY, 44 R. I. 333, 117 Atl. 359; regulation restricting a pilot's license to legal voters of the state was upheld in STATE *v.* AMES, 47 Wash. 328, 92 Pac. 137; a peddler license in COMMONWEALTH *v.* HANA, 195 Mass. 262, 81 N. E. 149 (1907); liquor licenses in TRAGESER *v.* GRAY, 73 Md., page 250, 20 Atl. 905; BLOOMFIELD *v.* STATE, 86 Ohio 253, 99 N. E. 309 (1912); TRIMBLE'S LICENSE, 41 Pa. Super. Ct. 370 (1909). A statute requiring foreigners to procure a license to work in gold mines was approved in PEOPLE ex rel *v.* NAGLEE, 1 Cal. 232, 52 Am. Dec. 312 (1850); unnaturalized foreign born residents were denied the right to kill game or to possess or own a shotgun or rifle in PATSONE *v.* PENNSYLVANIA, 232 U. S. 138, 58 L. Ed. 539 (1914); fishing in waters of a state was denied to aliens in SILVER *v.* STATE, 147 Ga. 162, 93 S. E. 145; ALSOS *v.* KENDALL, 111 Oregon 359, 227 Pac., page 286 and STATE *v.* KOFINES, 53 R. I. 211, 80 Atl. 432.

There is a line of cases where certain of the states, by appropriate statutes, imposed a tax, money charge or fee either on the vessel owners or the immigrants at the port entry, to protect the state against paupers and others who might become public charges on the states of these various ports.

The Supreme Court held in this line of cases that where such statutes imposed these burdensome taxes on the shipmaster or the vessel owners, or the immigrants themselves, as a prerequisite or as a condition of landing of the immigrants, they were a tax for the right to land such passengers, and as such were unconstitutional. The court, however, upheld the requirement of a catalogue of passengers, with statements of their residence, etc.

The leading cases on this subject are the CITY OF NEW YORK *v.* MILN, 11 Peters 103 (1837); PASSENGER CASES, 7 Howard 283 (1849), and others.

In construing these cases, it is significant that the Supreme Court in HENDERSON *v.* WICKHAM, 92 U. S. 259, 23 L. Ed. 543, in the opinion by Mr. Justice Miller on page 269 said:

> "So far as the authority of the cases of New York v. Miln, and Passenger Cases can be received as conclusive, **they decide that the requirement of a catalogue of passengers, with statements of their last residence, and other matters of that character, is a proper exercise of state authority**, and that the requirement of the bond, or the alternative payment of money for each passenger, is void, because forbidden by the Constitution and laws of the United States. * * *" (Boldface ours)

Insofar as our investigation has led us there has never been a reversal of this position by the Supreme Court.

The question of the right of the duly constituted authority of the Commonwealth with respect to the use of highways and the granting of licenses to drive automobiles is ably considered in the case of COMMONWEALTH *v.* FUNK, 323 Pa. 390 (1936) from which we liberally quote as sustaining the

Commonwealth's right to deprive aliens unless registered of the right to use these highways as licensed drivers.

Mr. Justice Barnes said:

"The plenary power of the legislature over the highways of the Commonwealth is of ancient standing, and seldom, if ever, has been questioned: * * *

"It must be treated as elementary law that public roads are laid out and opened for the use of all persons on equal terms; that is, for all who comply with the reasonable regulations of the duly constituted authorities. The right to use a public highway for travel or in the transportation of merchandise is not unrestricted: Com. v. Dennison, 48 Pa. Super. Ct. 293. It is for the Commonwealth, acting through the legislature, to direct the conditions under which this limited right shall be exercised: City of Allegheny v. Zimmerman, 95 Pa. 287; Com. v. Doughty, 55 Pa. Super. Ct. 88. It alone has the power to regulate the manner and circumstances under which automobiles may be operated upon the highways of the Commonwealth. This power is vested in the legislature, and is based not only upon its right to control and regulate the use of the highways, but is buttressed by the inherent police power of the state.

"This power of the state has been upheld by the Supreme Court of the United States. In Kane v. New Jersey, 242 U. S. 160, 167, the Supreme Court said: 'The power of a state to regulate the use of motor vehicles on its highways has been recently considered by this Court and broadly sustained.' See Hendrick v. Maryland, 235 U. S. 610. Mr. Justice Butler said, in Hess v. Pawloski, 274 U. S. 352, 356: 'Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and prop-

> erty. In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all residents and nonresidents alike, who use its highways.' See also Hodge Co. v. Cincinnati, 284 U. S. 335."

From the foregoing, it is evident that the Pennsylvania Alien Registration Act is not an infringement of the Federal prerogative or powers. The Commonwealth is not here endeavoring to deport an alien nor deprive him of the right to enter or remain in the State. The fourteenth amendment did not deprive the states of their police power, and all that the statute under discussion provides is that such aliens register with the State so that certain facts with respect to their status be certified for purposes directly concerned with the exercise of the State's police power.

As indicated, supra, states have power to legislate with respect to aliens so long as the regulations provided in the act do not invade the sphere of national sovereignty or obstruct or impede the exercise of any authority which the Constitution has confided to the nation or if it does not deprive citizens of the rights guaranteed to them thereunder. The Alien Registration Law does not intend, nor does it in any manner conflict with or obstruct the Federal act with respect to aliens in connection with their requirement in registering with the immigration authorities. Immigration stops at the port of entry. The Pennsylvania statute, by requiring registration of aliens resident within its borders, reveals particular aliens who settle in the State, and does not invade the sphere of national sovereignty.

It should be noted that if a statute is enacted under the police power of the state, and if it in turn has a reasonable relation to the proper legislative purpose, and if it is neither arbitrary nor discriminating, the act must be regarded as constitutional since it meets the requirements of the Due

Process Clause of the Fourteenth Amendment of the United States Constitution.

With a large part of the World in a state of war we are facing a critical time in our history and we must anticipate trouble from those living within our borders whose allegiance is not to our form of government. It is recognized that there is within the various states and the Nation a Trojan Horse, a Fifth Column, be it Nazi, Fascist or Communist, which is spreading propaganda to undermine, by constant boring from within, the morale of our inhabitants, to harm our industrial plants and to make us an easy prey to the enemy. This group, organized for the purpose of sabotaging industrial plants necessary to create a supply of war materials essential for protection, works first in the state.

This court has repeatedly held that the state is the best judge of what is necessary for its protection. The convenience of a few to determine who is resident within the borders of the state is small in comparison with the safety and general welfare of the state and the Country as a whole. The state still has the right, as a local police measure, to regulate or register aliens so long as its regulations or registrations are not repugnant or irreconcilable with Federal enactments.

The Pennsylvania statute bases its classification on reasonable grounds and is not a mere arbitrary selection. It is not an oppressive measure and will obviously prove a beneficial and helpful measure to all inhabitants of the State including citizens and law-abiding aliens. By its requirement of registration, the State is aiming to acquire something of the same measure of control over aliens that the State has acquired over citizens, through registry of vital statistics, voters, and similar measures.

It is respectfully submitted, therefore, that the decision of the District Court holding the Alien Registration Act unconstitutional should be reversed, and the Alien Registration Law upheld, and further that injunction issued against appellants be dissolved.

Respectfully submitted,

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